

Office: Intelligence Activities

OGC:LEH:jeb

14 February 1955

D
R
A
F
T

OGC Has Reviewed

MEMORANDUM FOR: Task Force on Intelligence Activities

SUBJECT : Legal Background, Responsibility, and Authority
of the Central Intelligence Agency

While the Central Intelligence Agency is based on law, the analysis and interpretation of the law is necessarily interwoven with historical and policy considerations. Consequently, we will have to touch on these aspects but will try to limit our conclusions to legal considerations. We will divide our discussion into broad categories which lend themselves to separate study:

I Position of the Central Intelligence Agency in the Structure of Government.

The Central Intelligence Agency is the direct result of two major experiences in World War II. The first was Pearl Harbor and the postwar investigation into the part intelligence played in the failure to give adequate warning of the impending Japanese attack. The second was the establishing of the Office of Strategic Services and the lessons derived therefrom by its Director, Major General William J. Donovan. The Pearl Harbor investigation fixed in the minds of Congress the fact that the necessary information to predict the attack was available but that there was no system for assuring that that information, properly evaluated, was brought to the President and his top advisors so that appropriate decisions could be made and instructions sent to the military commanders. It also demonstrated

that in the prewar structure no one official was responsible for whatever failure of intelligence was involved, and the military commanders were forced to take the main blame for the surprise. (The debate on Pearl Harbor and the reports thereon are too voluminous for attachment here, but I believe the foregoing reflects the conclusions insofar as intelligence is concerned.)

Therefore, when the Congress turned its attention, in 1947, to the postwar intelligence organization, there was widespread feeling that responsibility must be centered at one point so that Congress would not again have to find itself unable to determine where failure lay. General Donovan was equally convinced, but for somewhat different reasons, that the postwar intelligence organization must respond to a central point which, in his opinion, should be directly responsible to the President. The Office of Strategic Services was not a central intelligence organization. It was an independent agency, created by military order of the President, and placed for operational supervision under the Joint Chiefs of Staff. It had no responsibility for over-all correlation and evaluation of intelligence nor for coordination of the intelligence activities of the Government generally. It was these shortcomings that convinced General Donovan that the postwar structure must be truly central.

Attached, as Appendix A, is a series of papers tracing the development of the central intelligence idea from General Donovan's original memorandum to the President of 10 October 1944 to the directive of President Truman of 22 January 1946 establishing the

25X1A

Central Intelligence Group. These papers, in the form here presented, were compiled by the late [REDACTED] who had been Chief of Secret Intelligence for the Office of Strategic Intelligence in the Middle East and later Chief of Operations for the Strategic Services Unit. The commentaries are those of [REDACTED]. These papers pretty well represent the different views on intelligence organization and function, present the arguments for each and the resolution in favor of a centralized coordinating function. The difference between General Donovan's view that the Director of Central Intelligence should report to the President directly and the views of the military services and the Department of State that he should report to a board or through a department head were resolved by President Truman by the creation of the National Intelligence Authority, consisting of the Secretaries of State, War, and Navy, and the President's personal representative. It appears fairly clearly from these documents that the idea of a centralized coordinating function was pretty well accepted and the main debate was on the position of this function in the Government structure and its responsiveness to departmental controls.

25X1A

President Truman put the basic responsibility in the National Intelligence Authority and, subject to law and their direction and control, gave the coordinating, evaluating, and dissemination functions to the Director of Central Intelligence. The concept of Admiral Souers and the White House at that time was that the Central Intelligence Group would be an interdepartmental group composed of a staff furnished by the National Intelligence Authority departments and would provide

for the coordination but would not itself be an operational entity. Prior to the Truman Order of 22 January 1946, however, the position of the Director of Strategic Services had been abolished, the Research and Analysis Section of the Office of Strategic Services had been transferred to the Department of State, and the remainder of the Office of Strategic Services had been put under the jurisdiction of the Secretary of War, with the directive that it be liquidated as rapidly as possible except for such activities and assets as might be required for the peacetime intelligence function. These remnants were set up on 1 October 1945 as the Strategic Services Unit of the War Department, an almost autonomous unit reporting to the Under Secretary of the Army. The paramilitary aspects were rapidly liquidated, leaving essentially the Secret Intelligence, Counterespionage, and Communications Offices with the attendant administrative support staffs.

Upon the creation of the Central Intelligence Group, the Strategic Services Unit's contribution began to turn to the direct support of the Director of Central Intelligence, and by the spring of 1946 they were working almost as an integrated operation. This presented formidable legal and administrative problems, which led to the conclusion that the Central Intelligence Group should absorb the assets of the Strategic Services Unit and operate them directly. This was done in the fall of 1946, the funds and assets being taken over directly, the personnel being taken by transfer (allowing selective appointment from the Strategic Services Unit's rosters), and the documents being placed in the custody of the Central Intelligence Group, although for some purposes they were considered Joint Chiefs or War Department papers. Also during 1946 General Vandenberg had

requested drafts of functional and enabling legislation, which were prepared in the form of a single bill establishing the Agency, setting forth its functions, and providing for all the authorities deemed necessary for it to operate. (Meanwhile, practical arrangements had been made with the Treasury, the Comptroller General, and other agencies to allow the Central Intelligence Group to expend its own funds and otherwise act as a separate agency.) This draft legislation was brought up for top-level study in the Executive branch of the Government at about the same time the unification of the military services was being considered. As the National Security Act took form, that portion of the draft legislation establishing the Agency and setting forth its function was incorporated into the proposed National Security Act inasmuch as it was deemed desirable to have the Director and the Agency directly responsible to the National Security Council, of which the President was to be ex officio Chairman.

While there were many at various levels who objected strenuously still to the central intelligence idea and to a separate, independent agency to perform the function, every review at top levels confirmed the earlier conclusions in the Executive branch that the Director of Central Intelligence should not be subordinate to any agency or board lower than the Secretaries. Aside from the debate on legislation, a separate struggle was in process in the field of intelligence proper. The January order put the Central Intelligence Group under the direction of the Director of Central Intelligence, who was to be responsible for the functions, assist the National Intelligence Authority, and be appointed by the President. The Order further provided that

the Director would be advised by an Intelligence Advisory Board, consisting of the heads or their representatives of the principal military and civilian intelligence agencies of the Government. The struggle which ensued was based on the question of whether the Director had any supervision or authority over the members of the Advisory Board and the agencies they represented, or whether he was one among equals who would proceed by Board decision. The succeeding Directors believe that since the President had made them responsible for the function and had set up the Board to advise them, they must exercise the function even if the entire Advisory Board disagreed with the Director's decision. The heads of the intelligence agencies, however, held that the command channels could not be impaired and consequently the Director could in no way interfere in their departmental responsibilities and the conduct of the activities of their agencies.

In the spring of 1947 the Director, then General Vandenberg, deemed it necessary to present to the National Intelligence Authority a paper by which they would constitute him executive agent of the National Intelligence Authority for all matters in the field of intelligence. This paper was approved by the members of the National Intelligence Authority but was not put into effect prior to the time General Vandenberg was succeeded by Admiral Hillenkoetter. In view of the almost simultaneous passage of the National Security Act, Admiral Hillenkoetter did not see fit to promulgate the executive agent paper of the National Intelligence Authority. The National Security Act of 1947 did not clarify the situation completely. The

Act created the Central Intelligence Agency and provided for a Director of Central Intelligence who should be the head thereof. The functions spelled out in the Act were made the duties of the Agency, subject to the direction of the National Security Council, whereas the Truman Order had held the Director responsible for the functions. We believe the opening wording of Section 102.(a) is significant, "There is hereby established under the National Security Council a Central Intelligence Agency with a Director of Central Intelligence who shall be the head thereof," It is our belief, taking into consideration the history and development of the central intelligence idea, that the Congress saw in the position of the Director of Central Intelligence a function and responsibilities wider in scope than those arising purely out of his position as head of the Agency. It is also significant, we believe, that the Act did not provide for an Intelligence Advisory Board.

One of Admiral Hillenkoetter's first moves was to initiate the drafting of a series of directives which would define the charter of the Agency under the law, and Directive No. 1 immediately again raised the issue of his position in relation to the other intelligence agencies. Admiral Hillenkoetter, stating that he needed all possible assistance and support from the military and civilian intelligence components, proposed that he appoint an Intelligence Advisory Committee, consisting of the heads thereof, to assist him. This was strongly resisted by all of the intelligence components outside of the Central Intelligence Agency on the ground that the Director had no authority to constitute them as members on a board advisory to him. They insisted that any such appointment would have to be done by the

President or the National Security Council. It was, therefore, agreed to provide in NSCID #1 that there would be an Intelligence Advisory Committee which, the directive specified, would be for the purpose of advising the Director of Central Intelligence in carrying out his functions.

The structure thus established by statute and further refined by directive is one which we believe has no precise parallel elsewhere in Government. We have no doubt that the Congress intended to make the Director of Central Intelligence solely responsible in the field of foreign intelligence relating to the national security (the Act nowhere uses the limiting word "foreign," but we believe the intent is made clear by the prohibition against internal security functions). Intelligence relating to the national security is all encompassing and requires the product of departmental collection and evaluation, activities of common concern, public sources of information, and every other means of acquiring information on foreign developments affecting the national security. The Director's responsibility, therefore, is all embracing, but the Congress did not see fit to give him authority compatible to the responsibility. He cannot exercise any command authority over the departmental intelligence components, yet as head of the Agency he has a statutory duty to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as related to the national security and to make recommendations to the National Security Council for the coordination of such intelligence activities. The Director must, therefore, of necessity consider the scope,

effectiveness, completeness, or duplication of the departmental contributions to the over-all intelligence relating to the national security.

As intelligence advisor to the National Security Council, we believe the Director's position in regard to the other intelligence chiefs is one of pre-eminence with overriding responsibilities which must be carried out through the proper management and utilization of the various components of the intelligence structure. One of the main management tools in this respect is the Intelligence Advisory Committee through which problems can be considered, issues defined, and, if necessary, recommendations staffed for the National Security Council. Intelligence Directives of the National Security Council pursuant to the Act have, in our opinion, the force and effect of law on the intelligence agencies affected thereby. In order to avoid needless submissions to the National Security Council, it was determined that where agreement could be reached among the agencies concerned the Director would issue Intelligence Directives which would be binding so long as they were in effect. An excellent example is the one affecting the field of so-called "Agreed Activities" in clandestine intelligence. For a long period of time attempts were made to negotiate bilateral agreements between the Agency and individual departmental intelligence components. It was the belief of this Office that this was an incorrect approach to the problem, and we recommended that the Intelligence Advisory Committee consider the issue with an eye to the issuance of a Director of Central Intelligence Directive. Such a Directive has now been published and we believe properly reflects

the Director's responsibility in that field without interfering with normal command channels (Director of Central Intelligence Directive No. 5/1).

There are many other management tools similar to the Intelligence Advisory Committee, although many of them vary in detail. Thus, the Director is now permanent Chairman of the United States Communications Intelligence Board, but a separate responsibility is put on the Secretary of Defense who was made Executive Agent for the Government in the field of communications intelligence. These are not necessarily conflicting responsibilities and on the whole do not interfere with each other. There are many other committees, interdepartmental boards, and similar mechanisms, all of which, we believe, must give regard to the primary responsibility of the Director of Central Intelligence in the field of intelligence relating to the national security. It is our opinion that if through education and experience this concept of the entire intelligence structure is understood by those engaged in its operations, the absence of command authority concomitant to the Director's responsibility is not fatal.

II Collection of Intelligence Made by the Central Intelligence Agency

There is no question that the primary function that the Congress made a duty of the Central Intelligence Agency was the correlation and evaluation of intelligence relating to the national security and the appropriate dissemination therefor. Nowhere is the Central Intelligence Agency given a specific directive to collect, and only the departmental agencies are mentioned in connection with collection in the Act. However, the Armed Services Committees of the Congress

showed great interest in and took a great deal of testimony on clandestine collection. All of their studies in this regard were in executive session and much of the discussion or testimony was off the record. Consequently, we can only state what we believe to be accurate conclusions of this consideration by the Congress.

While they heard some opinion to the contrary, we believe the Committees were persuaded by the philosophy that clandestine activities of all sorts to be effective must be centrally coordinated or controlled. At the period right after the war, the discussion centered almost entirely on covert intelligence and counterespionage as opposed to clandestine operations in the psychological and paramilitary fields. The consensus was that clandestine activities should be conducted by the Central Intelligence Agency and there was some feeling for so stating in the Act, but it was determined that this would be unfortunate from a security viewpoint and also from the impact on the American public. The Committees, therefore, adopted the language with minor changes of the Truman Order on services of common concern and other functions and duties related to intelligence affecting the national security. It is our belief that the Congress felt that the Central Intelligence Agency would have exclusive jurisdiction in the field of clandestine intelligence and, therefore, would carry out that function as a service of common concern, although it went on to the language about other functions and duties in order to assure that the Central Intelligence Agency could operate freely in this field without any limitations.

It is interesting to note that the early Joint Chiefs of Staff papers and the National Intelligence Authority discussions on this

matter also tended to the theory that the Central Intelligence Agency would have exclusive jurisdiction in the clandestine intelligence field. That this is not possible nor desirable is reflected in Director of Central Intelligence Directive No. 5/1 relating to Agreed Activities, which establishes that various agencies have responsibilities in this field but that the Director is responsible for the over-all coordination thereof. The statutory authority of the Agency in the collection field must, therefore, be read into Sections 102.(d)(4) and (5). Other examples of additional services of common concern under Section 102.(d)(4) are the [REDACTED]

25X1A

25X1A

[REDACTED]. The example of a function related to intelligence under Section 102.(d)(5) is the Translation Service which is primarily to assist the Central Intelligence Agency and is not a service of common concern.

We do not believe there is any inconsistency between the second proviso of Section 102.(d)(3) of the National Security Act of 1947, which provides that the departments and other agencies shall continue to collect, evaluate, correlate, and disseminate departmental intelligence, and Section 102.(d)(4) about performing for the benefit of the existing intelligence agencies such additional services of common concern as the National Security Council determines to be more efficiently accomplished centrally. The proviso can, we believe, be reasonably construed to assure that the departmental components can collect according to their departmental needs. If their needs can be effectively provided for by a central function and that function can be more efficiently accomplished centrally, there seems no legal reason why the National

Security Council should not determine that it should be performed by the Central Intelligence Agency. Since the other intelligence agencies are represented on the National Security Council, there seems no impairment of any command line or departmental responsibility.

III National as Opposed to Departmental Intelligence

Little or nothing appears in the legislative history of Section 102 of the National Security Act of 1947 to establish a specific congressional intent in using the words "intelligence relating to the national security." The same words have been used in the Truman Order of 22 January 1946 setting up the Central Intelligence Group and were apparently considered sufficiently well established and needed no elaboration. The statute does vary slightly from the Order where it provides for appropriate dissemination of "such" intelligence, whereas the Truman Order said the appropriate dissemination within the Government of the resulting strategic and national policy intelligence. We do not believe this is a substantive change. To the Congress the whole lesson of the Pearl Harbor episode was that the President and his immediate policy advisors should be provided with complete and objective estimates in the intelligence field and that, in addition, such estimates must receive dissemination to those agencies with primary responsibility for protecting the national security. Where departmental intelligence can be defined narrowly or broadly, and in the latter sense may well be intelligence relating to the national security, we believe that the Congress had in mind a philosophy rather than a definition and intended to provide for a product which would be greater than the sum of its parts by reason of a final centralized correlation and evaluation.

IV Cold War Activities and the Operations Coordinating Board

No specific statutory authorities exist for the conduct of covert operations in the psychological-paramilitary fields. In general we do not believe the Congress contemplated such activities at the time when the National Security Act of 1947 was passed. In the internal drafting of the proposed legislation, however, we had provided authorities which experience in the Office of Strategic Services had demonstrated would be necessary to the conduct of covert operations as well as clandestine intelligence. These authorities were granted in full by the Central Intelligence Agency Act of 1949. By that time, the Committees which considered that Act were, at least in part, aware that the Central Intelligence Agency was expending funds for covert activities. To my knowledge, cold war activities in the covert field were initiated by Secretary Forrestal, who was firmly convinced that such activities were essential to combat the growing Russian drive for domination of countries all over the world. I was told by Admiral Hillenkoetter that Secretary Forrestal had asked him whether the Central Intelligence Agency had sufficient authority to conduct such operations. I replied that we had the administrative authorities necessary to support such activities, but we had no funds given us for that purpose. I stated that in my opinion if funds were given by the Congress to the Central Intelligence Agency for the purpose of supporting such activities, we would be legally authorized to undertake them. The Committees of the Congress were briefed on the requirements and were aware in granting the funds that they were to be used for broader purposes than clandestine intelligence and counterespionage.

In succeeding years increasingly detailed briefings have been given to the Armed Services Subcommittees of the Appropriations Committees so that funds have been authorized with specific knowledge of their intended use. The Comptroller General and the Department of Justice are well aware that the Central Intelligence Agency is financing and conducting such activities and have raised no question as to the legal authority to do so. On undertaking psychological and paramilitary operations, whole new fields of complex coordination were encountered. It was necessary to assure that covert psychological operations were consistent with national policy and at the very least not inconsistent with overt propaganda aims. Eventually a board called the Psychological Strategy Board was created by the President on 4 April 1951 to formulate national psychological objectives and see that they were carried out. We were forced to make objection to the concept of the Psychological Strategy Board on legal grounds on the theory that it was the creation of an operating agency by the Executive in violation of the restrictions of the Economy Act of 1932, which permitted inter-departmental committees and coordination groups but not creation of an operating group without statutory authority. The Comptroller General expressed himself along the same line, but agreed not to protest the creation of the Board on the understanding that the purpose would be specifically presented to the Congress at the earliest opportunity. This opportunity was taken at the next request for funds by the Central Intelligence Agency, and funds were provided for the Psychological Strategy Board as constituted by the President. The Board was eventually replaced, in 1953, on other grounds on the recommendation

of the so-called Jackson Committee, properly known as The President's Committee on International Information Activities. This Committee recorded that the Psychological Strategy Board was not properly conceived on the theory that there were national psychological directives separate and distinct from national objectives. They felt national policy would determine the objectives and what was needed was a coordinating board to keep the functional lines clear and see to it that the responsible agencies performed their functions in a manner which would meet national policy. The President thereupon established the Operations Coordinating Board by Executive Order 10483, 5 September 1953. In the earlier drafts, Section 2., in effect, gave the Board responsibility for seeing to it that the operational plans developed to carry out national security policy were properly developed and executed. The Department of Justice objected on somewhat the same grounds we had raised in connection with the Psychological Strategy Board and insisted that the Board could do more than "advise with the agencies concerned as to" operational planning, coordination, and execution. With this modification, the Comptroller General had no objection to the constitution of the Operations Coordinating Board. The Congress has provided funds specifically for the support of the Board as now constituted.

LAWRENCE R. HOUSTON
General Counsel

Attachment - Appendix A